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BRIEF FOR PETITIONERS

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1492

WALTER E. WASHINGTON,
Individually and in his capacity as
Commissioner of the District of Columbia, et al.,
Petitioners,

v.

ALFRED E. DAVIS, et al., GEORGE HARLEY,
JOHN D. SELLERS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court is reported at 348 F. Supp. 15 (1972), and is contained in the Appendix to the Certiorari Petition[1] at pages 48-52. The ma-

[1] References to the certiorari appendix will be prefaced by the designation "CA." References to the single appendix will be prefaced by the designation "A."

jority and dissenting opinions of the Court of Appeals are reported at 512 F. 2d 956 (1975), and are contained in the Appendix to the Certiorari Petition at pages 1-47.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1975. The petition for a writ of certiorari was filed on May 28, 1975, and granted on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the undisputed statistical data of record conclusively establishes the absence of an adverse racial impact in the Metropolitan Police Department's selection procedures and thus renders unnecessary a demonstration by the Department that its entrance test is job related.

2. Whether the Department's entrance test is demonstrably a rational measure of the verbal ability a police applicant must have to be trained in the Department's recruit school and, as such, is job related under established fair employment criteria.

STATEMENT

Petitioners are the Mayor-Commissioner of the District of Columbia and the District's Metropolitan Police Chief. Respondents are unsuccessful applicants for appointment to the Metropolitan Police Department (hereinafter "the Department") who failed the Department's entrance test (hereinafter "Test 21"). In the District Court, respondents challenged that test as racially discriminatory, in a class action on behalf of all blacks who unsuccessfully sought appointment to the Department since the beginning of 1968 (A. 24-26). The District Court upheld the validity of Test 21 and entered summary judgment in petitioner's favor. In reversing, the United States Court of Appeals for the District of Columbia Circuit, with Judge Robb dissenting, held that Test 21 has a disproportionate racial impact and was not shown to be job related. The key facts are as follows:

The Department recruits officers in the 20-29 age group primarily from the Metropolitan Washington area which has a radius of 50 miles from the center of the city. Since Chief Wilson took office in August 1969, the Department has made significant efforts to recruit black officers, and 44% of all new recruits have been black (CA. 49; A. 71-72). An affidavit of the Department's Administrative Services Officer, executed on July 17, 1972, recites (A. 72) that:

> "The total population of the District in the 20-29 age group [according to the 1970 Census] was reflected to be 142,161 with the racial contrast being as follows:

Black	Males	42,447
	Females	53,352
		95,799
White	Males	22,711
	Females	23,651
		46,362

> The 20-29 age group is that age group from which new officers are recruited. When viewed from the standpoint that for our recruiting purposes the 'local' or metropolitan Washington Area is a radius of 50 miles, a rate of hiring blacks of 44% is demonstrative of the success of the Department's effort to recruit blacks since that percentage is significantly

higher than their proportional representation in the 'local' recruiting area."

During 1970 and 1971, the two most recent years for which statistics are shown, 53% of the tested applicants and 43% of the appointed officers were black (A. 34-35). A detailed survey of recruiting in the period January 1970 to September 1970, shows that more than 50% of officers recruited were black (CA. 49-50; A. 67-68). Respondents, as applicants for appointment, took and failed Test 21 in August 1970 (A. 26). Over the past several years, many blacks, numbering in the hundreds, passed the test but, for other reasons, did not become members of the Department (CA. 50). Among the applicants tested in 1970 and 1971, 56% of the blacks failed the test as compared to a failure rate of 15% for whites (A. 34).

Discussing Test 21 in the context of the Department's intensive efforts to recruit black officers, Dr. Albert Maslow, Chief of the United States Civil Service Commission's Personnel Measurement Research and Development Center, in an affidavit executed February 29, 1972, recites (A. 191-192) that:

> "* * * The racial composition of the uniform force of the Police Department over the past five years is more related to the nature of recruitment efforts than to the impact of the test. Test 21 has been used for many years, and a score of 40 right has been the required passing standard for approximately 20 years. The overall proportion of applicants passing this test has remained fairly stable at about 60 percent over the years for applicants who had at least a high school education or its equivalent.
>
> "Nevertheless, in the past five years, because of changes in the recruiting policies and practices, and the increasing concentration of Negroes in the Metropolitan Area which is the primary labor market for these jobs, there has been a dramatic increase in the representation of Negroes in the Police Department, *without any change in the test content or passing point.* * * *

> "Negroes increased in number and percentage even between 1965 and 1967 when the total force decreased. Furthermore, from 1967 to date, the white segment of the force increased by 47%, the Negro by 228%. I conclude from this that if Test 21 were discriminatory, the MPD would not have been able to make such remarkable gains in the percentage and numbers of Negroes by merely changing its recruitment policies." (Emphasis in original.)

An applicant for appointment to the Department is required, *inter alia*, to have a high school education or the equivalent (CA. 48), and the validity of this entrance requirement has not been challenged by respondents. In addition, the applicant must achieve a minimum score of 40 out of a possible score of 80 on Test 21. Prepared by the United States Civil Service Commission (hereinafter "the Commission"), Test 21 is a straightforward test for verbal ability consisting of vocabulary, reading comprehension, interpretation of reading passages, and general information items. It is used to predict the success of applicants in the Department's Training Academy. (CA. 22-45; A. 202.) A study done for the Commission by D. L. Futransky in November 1967 (A. 99-109), firmly established a clear and positive relationship for both blacks and whites between their Test 21 scores and their academic averages at the Training Academy (A. 99, 102-103). The study was tendered to the District Court together with the affidavits of various psychologists who analyzed and explained it and commented favorably on Test 21 as a predictive device designed to ascertain whether an individual has the verbal ability to be trained as a policeman (A. 172-208).

Dr. Maslow, in his affidavit, analyzes and explains the statistical relationship between average scores in Test

21 and academic averages in recruit school for both blacks and whites, and points out how the verbal ability, which the test is designed to measure, is "a critical factor in training success" (A. 188-192). He goes on to cite as examples of the academic training, which the recruit must absorb, various courses pertaining to different areas of the law, including juvenile delinquency, evidence, and a host of municipal regulations. (A. 192-193). Dr. Donald J. Schwartz, in his affidavit, states that "* * * Test 21 has been professionally validated, i.e., shown to be job-related, because by a criterion-related validity study, the Government has shown that Test 21 has a significant positive correlation with success in the Metropolitan Police Department * * * Recruit School for both blacks and whites" (A. 179). Dr. Mary L. Tenopyr states in her affidavit that "* * * for both blacks and whites, scores on Test No. 21 are statistically related to job performance in D.C. police training" and that "[t]hrough the history of industrial psychology, verbal ability tests like Test No. 21 have consistently been found to be useful predictors of success in training based upon the use of words" (A. 173-174). Similarly, Dr. David M. Nolan, the Director of the Washington, D.C. Office of Educational Testing Services, recites in his affidavit (A. 203) that:

> "To use as an entrance requirement to police training a device that predicts how well candidates will perform in that training is a perfectly reasonable and justifiable procedure with many precedents. Practically all professional training (Law, Medicine, Architecture, Psychology, Business, Science, etc.) follow just such a procedure. * * *"

Diane E. Wilson, a Personnel Research Psychologist, in addition to reviewing Test 21, reviewed the study materials distributed to recruits at the Training Academy, including materials relating to the Law of Arrest, Search and Seizure, the Rules of Evidence, the Criminal Law

and Procedure sections of the District of Columbia Code, the Alcoholic Beverage Control Act, and the Police Regulations and Traffic Regulations of the District of Columbia. The final examinations covering these subjects "account for approximately 50 percent of the final grade average in training" (A. 185-186). Based on such a review, she observed, *inter alia*, that "* * * the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training as determined by the final grade average attained by the recruit" (A. 185). This psychologist concluded (A. 185) that:

> "* * * the recruit must have the verbal ability to read and understand rather complex, legalistic language. It is my opinion that there is a direct and rational relationship between the content and difficulty of Test 21 and successful completion of recruit school training."

The Recruit Training Curriculum was also tendered to the District Court (A. 110-171; cf. CA. 50).

Respondents relied on data tending to establish that blacks on the average score lower than whites on Test 21 (A. 34), and on affidavits executed by two psychologists and a statistician (A. 49-63). These affidavits recited in conclusionary fashion that Test 21 was not racially neutral and was racially discriminatory or unfair to blacks (A. 50, 54, 56). Respondents' psychologists also noted the failure of the Commission's study to correlate the Test 21 scores of black officers to their job performance following graduation from the Training Academy (A. 50-51, 54-55). But neither psychologist attempted to specifically rebut the conclusion of the study that Test 21 was a sound predictor of success in the Training Academy and neither psychologist made a study of the policeman's job or reviewed the materials furnished recruits at the Academy with a view to render-

ing an opinion on whether the level of verbal ability measured by Test 21 is higher or lower than that required for successful completion of the Academy's curriculum (cf. A. 50-51, 54-55).

In upholding Test 21, the District Court held that it "is neither so designed nor operates to discriminate against otherwise qualified blacks" (CA. 51). The court observed that, notwithstanding the relatively higher percentage of black test failures, the percentage of black officers recruited by the Department closely approximates the population ratio of the eligible 20-29 age group (CA. 49), and that "the Metropolitan Police Department is a model nationwide for its success in bridging racial barriers" (CA. 52). In addition, the court reviewed the syllabus of the training course at the Police Academy and noted that it was designed to meet the Department's needs to train recruits who have the verbal ability to assimilate a variety of matters pertinent to modern law enforcement. The court held that Test 21 was a fair measure of that verbal ability and that "the undisputable facts prove the test to be reasonably and directly related to the requirements of the police recruit training program * * *" (CA. 51).

The Court of Appeals reversed, and this Court thereafter granted a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals held that the Metropolitan Police Department's Test 21 has an adverse racial impact sufficient to compel a demonstration of job relatedness and went on to hold that such a demonstration had not been made. Both of these holdings are erroneous.

1. In resolving the question of adverse racial impact, the Court of Appeals held that disproportionate or unfavorable minority pass-fail rates are always sufficient

to compel a showing of the job relatedness of a test. While such pass-fail statistics undeniably exist here, it is plain from this Court's decisions that an adverse racial impact must exist in overall hiring results rather than in unfavorable test results considered in isolation and that in spite of unfavorable minority pass-fail rates, there can be no adverse racial impact when a test does not operate in terms of employee selection to lock in previous discrimination or freeze a former racially unacceptable status quo. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975).

During 1970 and 1971, the two most recent years for which statistical data is available, blacks constituted 53% of all the applicants and 43% of those selected for appointment. It is thus apparent that the test does not select applicants for hire in a racial pattern *significantly* different from that of the pool of applicants. Moreover, since Chief Wilson took office in August of 1969, 44% of all new recruits have been black and this percentage correlates favorably with the minority population percentage applicable to the eligible 20-29 age group residing within the Department's primary recruitment area. Of even greater significance on the impact issue are statistics which disclose that since 1965 the percentage of blacks employed by the Department has soared from 17.5% to 36.5%. From December of 1967 to December of 1970, the percentage increased from 25.4% to 36.5%. The latter figures significantly represent an increase of 228% for black officers compared with an increase of 47% for white officers. Such spiralling percentage gains conclusively negate the notion that Test 21 has had the effect of perpetuating or carrying forward a pre-existing discriminatory employment practice, and an objective consideration of the totality of the statistical data of record will cogently demonstrate the absence of an adverse racial

impact in the Department's hiring practices sufficient to require a showing of the job relatedness of Test 21.

2. In any event, Test 21 is demonstrably job related under the equitable concepts ingrained in Title VII of the Civil Rights Act of 1964. That test is a straightforward test of verbal ability designed to predict an applicant's ability to be trained in the Department's recruit school where he is taught the concepts he must later apply when assigned to police duty in a modern city. Judicial pronouncements and authoritative study alike make plain the substantial degree of verbal skill that the contemporary policeman must obviously possess, given the nature of his job and the numerous legal concepts he must learn to effectively perform it. Undisputed data of record discloses that the recruit school curriculum and related study materials are heavily geared to matters such as arrest, search and seizure, rules of evidence, the elements of various codified criminal offenses, in addition to a host of municipal regulations, and that the level of verbal ability measured by Test 21 is at most no higher than that required for successful completion of recruit training. In addition, a criterion related study and explanatory data of record establish a clear and positive across-the-board relationship between Test 21 averages and recruit school averages for both black and white applicants. Since the study involved members of both races in the identical entrance level category and is devoid of subjective or vague criteria in dealing with the matter of recruit trainability, the differences between this case and *Albemarle Paper Co.* v. *Moody*, *supra*, are obvious.

The holding of the Court of Appeals that the test must fall for want of a predictive relationship among the test, recruit school performance, and a policeman's subsequent performance on the job, is inconsistent with the legislative history of Title VII, which plainly establishes that if a test is rationally designed to predict success

in training, apart from later job success, it must be upheld. And the court's holding that the test must be stricken because those who score below 40 (i.e., answer less than half of the 80 questions correctly) are not admitted to recruit school so as to permit a study of their trainability has the effect of erroneously invalidating a rationally based entrance requirement. Moreover, in taking such an approach, the court has engrafted a compelling governmental interest standard of review on occupational testing, notwithstanding the conceded lack of purposeful or intentional discrimination in this case. The court's holding in that regard is also in conflict with this Court's observation in *Albemarle Paper Co.*, 45 L. Ed. 2d at 301, that given the job relatedness of a test and by the same logic the reasonableness of a cut-off score, the burden of proving the feasibility of less restrictive selection procedures falls upon the complaining party. Finally, contrary to the holding of the Court of Appeals, the circumstance that no one who passes Test 21 and enters the Department's training academy is failed, detracts from neither the predictive significance nor the utility of the test and, if anything, establishes that the test accomplishes its intended result.

ARGUMENT

I

The Court of Appeals erroneously held that Test 21 has a racially disproportionate impact.

In rejecting the determination of the District Court that Test 21 does not operate "to discriminate against otherwise qualified blacks" (CA. 6; cf. CA. 51), and in holding that the test has a racially disproportionate impact, the Court of Appeals concluded that unfavorable minority pass-fail rates *standing alone* are always sufficient to establish an adverse racial impact and require a showing of job relatedness of a pre-employment test

(CA. 8). This Court has never so held, however, and an objective review of its decisions will demonstrate that such a rule cannot, and should not, be countenanced. In addition, a fair consideration of the undisputed facts of record, in light of principles enunciated by this Court, will demonstrate a clear absence of a racially disproportionate impact in this case.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the employer's burden of proving job relatedness arises upon a threshhold showing that the test "operates to exclude negroes" from entrance into a particular job (id. at 431). While the record in that case depicted disproportionate minority pass-fail rates (id. at 430, n. 6), this Court did not suggest that such a factor is invariably sufficient to require a showing of job relatedness and enunciated no all-inclusive norms in that regard. Later in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, n. 13 (1973), this Court suggested that the nature of the showing, sufficient to demonstrate the exclusionary impact of a test or other employment practice and to compel a burden of showing job relatedness, will necessarily differ from case to case. And in *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280, 301 (1975), this Court observed that the burden of showing job relatedness

> "* * * arises, of course, only after the complaining party or class has made out a prima facie case of discrimination—has shown that the tests in question select applicants for hire * * * in a racial pattern *significantly different* from that of the pool of applicants. * * *" (Emphasis added.)

It is thus clear that the disproportionate racial impact required to compel a showing of job relatedness must be traceable to *selection practices* considered as a whole rather than to test results considered in isolation. An examination of the undisputed facts of record will conclusively demonstrate that, notwithstanding the unfavorable minority pass-fail rates upon which the Court of Appeals placed conclusive reliance, there is no adverse racial impact in this case.

As previously noted, in 1970 and 1971, blacks constituted 53% of the applicants tested and 43% of those hired. While these figures indicate that a higher percentage of whites passing the examination was employed by the Department, they clearly do not indicate a hiring pattern of a magnitude and significance sufficient to demonstrate a racially disproportionate impact. It is interesting to note in this regard that while the Court of Appeals would automatically require a showing of job relatedness of a test on the basis of *either* disproportionate minority pass-fail rates or disproportionate minority population data (CA. 8), another circuit recently held that the burden of making such a showing was erroneously shifted, notwithstanding the presence of each of these factors. The Court regarded more significant the manner in which minority application percentages compared with minority selection percentages. See *Smith* v. *City of East Cleveland*, 520 F. 2d 492 (6th Cir., 1975), reversing 363 F. Supp. 1131 (N.D. Ohio, 1973).

In *Smith*, the District Court had found a racially disproportionate impact on the basis of data disclosing that blacks fared considerably worse on a police entrance test than their white counterparts and constituted a manifestly insubstantial percentage of the department in relation to the overall black population of the city (363 F. Supp. at 1145-1146). The Sixth Circuit Court of Appeals, in reversing, held that "the difference between the 33% of black applicants and the 29% of black police hired (seven of twenty-four from 1969-73) is insufficient to require defendants to justify the * * * [test] as job related." 520 F. 2d at 497. In concluding that the disproportionate impact must be "in the hiring rather than in the test results in and of themselves" (id. at 498), the Court applied a rule consistent with this Court's

previously quoted pronouncement in *Albemarle Paper Co.* Although the Sixth Circuit went on to note that its impact holding was consistent with that of the Court of Appeals in this case, it did not, as this Court does, have the benefit of the complete record in this case. The statistical data referred to by both the Sixth Circuit and the District of Columbia Circuit (cf. CA. 9-10, n. 32) was applicable to a specified 9 month period in 1970 during which 72% of the applicants and 55% of the new officers were black.[2] But statistical data spanning the most recent two year recruitment period (A. 34) is obviously more valuable as a basis for analysis. Since that data demonstrates that 53% of the applicants and 43% of the appointees were black, it negates the selection by petitioners of "applicants for hire * * * in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody, supra.*

But we need not end our impact inquiry on this point, for the record contains even more cogent statistical data which amply demonstrates the absence of an adverse racial impact in this case. Thus, if the "pool" from which applicants are selected is viewed in terms of the available work force in the Department's primary recruitment area, it will follow inexorably that there is no racial pattern of adverse significance here. In that regard, the District Court noted (CA. 49) that:

> "* * * Apart from one national effort, the recruiting effort has focused primarily on an area within a 50-mile radius of the center of the city. While there are no precise figures in the record, 44 percent black obviously closely approximates the population ratio for the eligible 20-29 age group in this wider area. A detailed survey of recruiting in the period

[2] It should be noted, however, that the Department's intensive minority recruitment efforts during the same period resulted in the appointment of 501 black officers as compared to 404 white officers (A. 67-68).

> January 1970, to September, 1970, shows that more than 50 percent of officers recruited were black."

And other federal courts have made clear that a favorable comparison between the racial composition of the employer's work force and the percentage of minority group members residing in the surrounding area is sufficient to negate a disproportionate racial impact. See *Jones* v. *Tri-County Electric Cooperative, Inc.*, 512 F. 2d 1, 2 (5th Cir., 1975); *Arnold* v. *Ballard*, 390 F. Supp. 723, 733 (N.D. Ohio, E.D., 1975); *Robinson* v. *Union Carbide Corp., Materials Systems Div.*, 380 F. Supp. 731, 739 (S.D. Ala., S.D., 1974). It is submitted that such a proposition is a sound one and warrants application here.

Moreover, while the overall proportion of applicants passing the test (over a period in excess of 20 years) has remained fairly stable at about 60%, the percentage of black officers employed by the Department has substantially increased (i.e., from 17.5% to 36.5%) during the period extending from 1965 to 1971. In 1967 and the years which followed, the percentage of blacks employed by the Department increased from 25.4% to 36.5%. In addition, "the white segment of the force increased by 47%, the Negro by 228%" (A. 191-192). These statistical data must be considered in connection with this Court's observation in *Griggs* (401 U.S. at 429-430) that:

> "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained *if they operate to 'freeze' the status quo of prior dis-*

criminatory employment practices." (Emphasis added.)

Applying that rationale here, it is indeed manifest that Test 21 does not operate to lock in a prior practice of discrimination, to freeze a racially unacceptable status quo, or to perpetuate or carry forward a racially tainted hiring practice of yesteryear. The significant correlation of minority recruitment percentages with minority population percentages, the continuing steady and substantial increase of black officers in the Department, and the significantly comparative growth percentage increases of more recent times, conclusively establish that the opposite is true. Or as the District Court put it (CA. 52), "the Metropolitan Police Department is a model nationwide for its success in bridging racial barriers." The record simply will not permit a determination of disproportionate racial impact, sufficient to compel a showing of the job relatedness of Test 21. Nonetheless, because the question of the job relatedness of a test of that kind is both highly important and vitally relevant to police recruitment practices throughout the nation, petitioners welcome this Court's resolution of the question, apart from any racial impact considerations. It is to a discussion of that question that we now turn.

II

Petitioners have demonstrated the job relatedness of Test 21.

Challenges to the job relatedness of employment tests have generally arisen under Title VII of the Civil Rights Act of 1964 as amended (hereinafter "Title VII"). See 42 U.S.C. § 2000e-2(h). Although the District of Columand its Metropolitan Police Department were not subject to Title VII at the time of the institution by respondents of the District Court proceedings (cf. CA. 2), the District Court relied on decisions applying Title VII concepts in concluding that Test 21 is "directly related to the requirements of the police recruit training program" and is thus job related (CA. 51). It is the position of petitioners that Test 21 passes muster under the standard applied by the District Court and that the view of job relatedness expressed by the Court of Appeals (CA. 17) cannot be squared with the applicable Title VII concepts.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court was concerned with tests for admission into the Coal Handling, Operations, Maintenance and Test Departments of a public utility. The tests were introduced by the employer on July 2, 1965, the very date on which Title VII became effective. They were adopted without meaningful study of their relationship to job performance and this Court held that they could not be utilized unless shown to be job related. 401 U.S. at 431-432. The employer also imposed a high school education requirement of questionable utility (id. at 427). Later in *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975), this Court was concerned with tests used by an employer who operated a plant which converted raw wood into paper. On the theory that a "certain verbal intelligence was called for by the increasing sophistication of the plant's operations," the company, in 1963, commenced utilizing the Wonderlic Test, a device designed, *inter alia*, to measure verbal intelligence and "highly related to formal education." See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Action of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1642 (1969). Earlier, the company had introduced a high school education requirement for entry into its skilled lines of progression, but soon concluded that this requirement did not improve the quality of the work force. 45 L. Ed. 2d at 302. In enunciating criteria applicable to a consideration of the job relatedness of the employer's test, this Court stated (id. at 302) that:

> "The question of job relatedness must be viewed in the context of the * * * [Department's] operation and the history of the testing program * * *."

The job of a policeman is markedly different from private industrial occupations like those involved in *Griggs* and *Albemarle Paper Co.*, for it contains a public interest ingredient which places it in a special occupational category. So much is clear from the myriad daily situations "incredibility rich in diversity" in which the policeman and members of the community encounter each other. *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968). Or as noted in the American Bar Association's Standards relating to "The Urban Police Function" (1973), § 7.2, "the nature of police operations makes the patrolman a more important figure than is implied by his rank in the organization. He exercises broad discretion in a wide array of situations, each of which is potentially of great importance under conditions that allow for little supervision and review." It is by no means surprising that the job of a policeman rationally calls for a high school education entrance requirement like that imposed by the Department (CA. 48), and not challenged by respondents.[3] And an analysis of the Department's verbal ability test in connection with the Department's operation, the history of its testing program, and its manifest need to recruit and train verbally skilled policemen, will shed considerable light on the job relatedness of that entrance examination.

Various authorities, in discussing the nature of a police department's operational role in a modern society underscore the need for police recruits to possess the verbal ability to be trained which Test 21 is designed

[3] The 1967 report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society," notes at 107 and 109 that more than 70% of all police departments require a police candidate to have a high school diploma (and see discussion at 20-21, *infra*).

to measure. In his concurring opinion in *Niemotko* v. *Maryland*, 340 U.S. 268, 289 (1951), Mr. Justice Frankfurter, speaking of breach of the peace statutes (which the newly appointed officer is called upon to frequently enforce) observed that:

> "It is true that breach-of-peace statutes, like most tools of government, may be misused. Enforcement of these statutes calls for public tolerance and *intelligent police administration.* These, in the long run, must give substance to whatever this Court may say about free speech. * * *" (Emphasis added.)

Compare: Report of the National Advisory Commission on Civil Disorders (1968), at 164-165.

And in *Allen* v. *City of Mobile*, 331 F. Supp. 1134, 1136 (S.D. Ala., 1971), aff'd., 466 F. 2d 122 (5th Cir., 1972), the Court, in upholding the validity of a police promotional examination in spite of the fact that the percentage of blacks failing the examination was significantly greater than the percentage of whites, made certain pronouncements which are equally applicable to the need for verbal abiilty tests designed to measure the new recruit's ability to be trained in the application of concepts with which he will obviously be concerned when subsequently assigned to police a modern city. The Court said:

> "All police officers, including the lowest patrolman * * * are frequently faced with constitutional questions of advising defendants of their rights under the *Miranda* decision, faced with questions of probable cause in making arrests and conducting searches and seizures, swearing out warrants, legal questions concerning lineups, and identification by photographs, etc. A rudimentary knowledge of the essentials of these legal problems is necessary if the citizens are to be protected in their rights, and when violations of the law occur, successful prosecution and conviction had of the guilty parties. This takes

on added significance in a day and time of rising lawlessness and criminal violence. We, the courts, have placed restrictive burdens on the law enforcement officials. We should encourage every effort to maintain and upgrade the quality of their work so that individuals may be secure in their constitutional rights and the public protected."

These judicial observations are by no means at variance with those of Quinn Tamm, a frequently quoted and widely recognized authority on the police:

> "It is nonsense to state or to assume that the enforcement of the law is so simple that it can be done best by those unencumbered by a study of the liberal arts. The man who goes into our streets in hopes of regulating, directing or controlling human behavior must be armed with more than a gun and the ability to perform mechanical movements in response to a situation. Such men as these engage in the difficult, complex and important business of human behavior. Their intellectual armament—so long restricted to the minimum—must be no less than their physical prowess and protection." (Tamm, "A Change for the Better" in "The Police Chief." Washington: I. A. C. P., 1962, at 5.)

In the report of the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" *supra*, it is pointed out at 107 that:

> "* * * A policeman today is poorly equipped for his job if he does not understand the legal issues involved in his everyday work, the nature of the social problems he constantly encounters, the psychology of those people whose attitudes toward the law differ from his. Such understanding is not easy to acquire without the kind of broad general knowledge that higher education [and certainly recruit training] imparts, and without such understanding a police-

> man's response to many of the situations he meets is likely to be impulsive or doctrinaire. * * *"

A Commission Task Force Report: *"The Police"* (1967), recommends (at 126) that persons serving as police officers should be required to have completed at least 2 years of college preparation at an accredited institution. Realizing that such a requirement could not become an immediate reality, the Task Force goes on to state (id.):

> "While such educational requirements could be implemented in only a limited number of departments today, it is imperative that all law enforcement agencies strive to achieve these goals as quickly as possible. As an appropriate first step, all departments should immediately establish a requirement that no person be employed in a sworn capacity until he has received a high school diploma *and has demonstrated by appropriate achievement tests the ability to perform successfully college level studies.* * * *" (Footnote omitted; emphasis added.)

In a related context, the Report of the President's Commission on Crime in the District of Columbia (1966) at 162 "recommends that the Department aim at a requirement of academic achievement beyond a high school education" and goes on to observe (at 174) that:

> "The fresh recruit often knows little or nothing of his potential authority, the laws or the customs of the community whose welfare he is to ensure, or the myriad mechanical aspects of policing a city. Moreover, his attitude towards the job awaiting him may be uncertain, and perhaps misguided. He must be trained and conditioned to his important task. The Police Academy and Training Section of the Metropolitan Police Department attempts to fulfill this difficult assignment * * *."

These authoritative pronouncements reinforce the obvious, i.e., that a policeman must have the verbal ability to

learn and absorb vital concepts essential to effective, intelligent, and impartial law enforcement. That being so, the fairness of requiring one seeking appointment to the Department to demonstrate his verbal ability and, as such, his trainability as a policeman, by achieving a score of 40 out of a possible score of 80 on Test 21 (CA. 22-45) is manifest. Or as pointed out in the Cooper and Sobol Commentary on Fair Employment Criteria, *supra* (82 Harv. L. Rev. at 1642):

> "Some tests have an obvious relevance to business needs and can clearly be justified for reasonable use as a criterion for employment decisions. A typist must know how to type and a welder to weld. A proofreader must be reasonably proficient at proofreading. * * *"

To this it may be fairly added that a police recruit must have the verbal ability to learn what the Department's training academy teaches. Or as the District Court so succinctly put it (CA. 50):

> "* * * Study of the syllabus of the training course readily demonstrates the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines. Daily the significance of these skills demanding reasoning and verbal and literacy skills is borne out in the crucible of the criminal trial court. Law enforcement is a highly skilled professional service. The ability to swing a nightstick no longer measures a policeman's competency for his exacting role in this city. * * *"

And as Judge Robb observed in his dissenting opinion in the Court of Appeals (CA. 20) "* * * Test No. 21 on its face is a fair and reasonable test of the ability of a police recruit to measure up to the qualifications" for "the highly skilled professional service" he must learn

to perform. It is against this background that we turn to a discussion of the undisputed data of record pertaining to the history and job relatedness of Test 21.

Since the Metropolitan Police Department, under D.C. Code, 1973, § 4-103, is subject to the procedures of the competitive civil service, it must appoint officers on the basis of competitive examinations and, of course, cannot hire persons who fail them. See 5 U.S.C. § 3304. "Test 21 has been used for many years, and a score of 40 right has been the required passing standard for approximately 20 years" (A. 191). The study conducted by D. L. Futransky in 1967, read in connection with the affidavits of experts who analyzed it, cogently demonstrates an across-the-board relationship between *average Test 21 scores and average recruit school scores for both blacks and whites* and that Test 21 is accordingly a reliable predictor of recruit trainability. In that connection, Dr. Maslow, who analyzed detailed statistical data from this study (A. 188), observed (A. 190) that:

> "* * * With respect to the spread of scores of Negroes and whites on both the entrance test and academic school averages, the spread (expressed statistically as the standard deviation) for both Negroes and whites is the same. The small difference in these samples are no greater than could be expected to arise purely by chance according to commonly accepted statistical standards.
>
> "With respect to the index of validity (the correlation between test and school average) the differences reported in the table for these samples again are no greater than could have been expected to arise by chance, according to statistical standards. With regard to the averages of the test and recruit school record, however, the differences between whites and Negroes on both measures *are* statistically significant. In both cases, the averages for Negroes were below the averages for whites. Furthermore, the

differences between the Negroes and whites average scores on the entrance test are quite in proportion to the Negro-white differences in the recruit school academic averages. * * *" (Emphasis in original.)

Given these factors, the instant case stands in sharp contrast to *Albemarle Paper Co.*, in which the study did not involve members of both races, was based in part on the use of subjective criteria (i.e., supervisorial ratings), and was directed to experienced workers for the purpose of supposedly validating the test as to new job applicants (cf. 45 L. Ed. 2d at 305-306).

In addition, both Dr. Maslow and Diane Wilson, a Personnel Research Psychologist, familiarized themselves with the training courses offered at the police academy (A. 185-186, 192-193), and the latter, based upon a review of the study materials with which recruits must become familiar, concluded that "the level of verbal ability measured by Test 21 is, at most, no higher than that required for successful completion of recruit school training" (A. 185). Respondents' psychologists, in contrast, undertook no study of either the policeman's job or the recruit school curriculum (A. 110-171) and voiced no opinion respecting the level of verbal ability measured by Test 21 in light of that required for successful completion of recruit training. It is submitted that Test 21 is demonstrably job related under the equitable concepts ingrained in Title VII.

In concluding that petitioners failed to establish the job relatedness of Test 21, the Court of Appeals was indeed "willing to assume that * * * [petitioners] have shown that Test 21 is predictive of future progress in recruit school" (CA. 12-13). However, the Court held that recruit trainability was inapposite as a criterion for validating Test 21, stating its reasons as follows (CA. 17):

"* * * [1] As long as no one with a score below 40 enters Recruit School, [2] as long as all recruits pass Recruit School, [3] as long as the Department's actions concede that Recruit School average has little value in predicting job performance, and [4] as long as there is no evidence of any correlation between the Recruit School average and job performance, we entertain grave doubts whether any of this type of evidence could be strengthened to the point of satisfying the heavy burden imposed by *Griggs*."

These reasons cannot be squared with the underlying phylosophy of Title VII.

In the District Court, petitioners contended, and the court concluded, that it was not necessary to show a relationship between Test 21 and an officer's job performance following his graduation from the police academy as long as the test was fairly designed (as previously demonstrated) to measure his trainability at the academy (CA. 51). Yet, in enunciating reasons numbered 3 and 4 above, the Court of Appeals, in effect, held that Test 21 must fall because petitioners failed to demonstrate a predictive relationship among the test, trainability at the police academy, and post-training performance on the job. The court's holding that the latter factor is of critical and controlling relevance in this case cannot be reconciled with the legislative history of Title VII, which cogently demonstrates that a test must be upheld if predictive of trainability, apart from subsequent job performance.[4]

Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), provides in relevant part that:

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[4] Although the precise question was not squarely presented to this Court in *Griggs*, the Court strongly suggested that a test may be reasonably designed "to measure the ability to learn to perform a particular job * * *." 401 U.S. at 428.

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer • • • to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. • • •"

As this Court noted in *Griggs*, Section 703(h) was not contained in the House version of the 1964 Civil Rights Act, but was added in the Senate, on the proposal of Senator Tower of Texas, following a decision of a hearing examiner for the Illinois Fair Employment Commission which suggested that standardized tests on which whites performed better than blacks could never be used (401 U.S. at 434-435). In offering the original version of his amendment, Senator Tower repeatedly emphasized that his proposal was seriously concerned with permitting the use of tests to determine one's trainability for a job as well as his effectiveness in performing it. Said the Senator from Texas:

> "• • • I hope my colleagues in the Senate will give very careful attention to the amendment. I believe the proponents of the bill realize that this is not an effort to weaken the bill. It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the *trainability of prospective employees*. The amendment arises from my concern about what happened in the Motorola FEPC case. I have discussed the case in great detail in the Senate, and I shall not repeat my argument.
>
> • • • •
>
> "This [the ruling of the FEPC examiner] is highly unreasonable, because if title VII were administered in this fashion, it would mean that an *employer would be denied the means of determining the train-*

> *ability* and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion.
>
> • • • •
>
> "If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or *trainability* or suitability of a person to do a job." (110 Cong. Rec. at 13492; emphasis added.)

Other Senators, including Senator Case of New Jersey, one of the co-managers of the bill on the Senate floor, evidenced their complete agreement with the principles thus expressed by Senator Tower, but voiced their disagreement with his amendment as originally proposed on the ground that it was "unnecessary" in light of other provisions of the bill and because the amendment as written would permit an employer to give any test "whether it was a good test or not, so long as it was professionally designed" with the result that "discrimination could actually exist under the guise of the statute." 110 Cong. Rec. 13503-13504. See also 401 U.S. at 434-435. The Senate for those reasons rejected the amendment as originally proposed (110 Cong. Rec. 13505), but two days later Senator Tower proffered a not so loosely worded "similar amendment" noting that it was designed to accomplish the kind of testing upon which the Senate had previously "agreed in principle" (110 Cong. Rec. 13724), and the amendment was promptly adopted, becoming what is now § 703(h) set forth above. It is not surprising that Senator Tower's characterization of the amendment as a means of authorizing tests, like that in question, to predict trainability won the acceptance of his colleagues, since such a notion has always won the widespread acceptance of those engaged

in professional testing (cf. 110 Cong. Rec. 13492 with Tenopyr and Nolan affidavits (A. 174, 203). It goes without saying that, as the *proponent* of § 703(h), Senator Tower's remarks are entitled to immense weight. See *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964). Unquestionably therefore, the Court's reasons numbered 3 and 4 are not in tune with the legislative history of Title VII. See Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1126 (1971).

In 1972, Congress amended Title VII to reach charges of racial discrimination in hiring and promotion in federal agencies and "in those units of the Government of the District of Columbia having positions in the competitive service * * *." See 42 U.S.C. § 2000e-16. The 1972 amendment authorizes the Commission to promulgate implementing regulations (42 U.S.C. § 2000e-16(b)), and on October 12, 1972, after the District Court proceedings, the Commission adopted regulations which relate, *inter alia*, to the job relatedness of tests like that involved. See 37 Fed. Reg. 21552-21559. These regulations reinforce the holding of the District Court that Test 21 must be upheld as a reasonable measure of recruit trainability and rebut the contrary notion expressed by the Court of Appeals. In that connection, S2-2a(2) (37 Fed. Reg. 21557) states that:

> "An appraisal procedure must, among other requirements, have a demonstrable and rational relationship to important job-related performance objectives identified by management, such as:
>
> * * * *
>
> "(c) Success in training * * *."

And S3-2 (37 Fed. Reg. 21558) provides in pertinent part:

> "a. *General standards of validation.* An applicant appraisal procedure is acceptable if * * *
>
> * * * *
>
> "(2) There is competent evidence of a useful degree of criterion related validity arrived at by comparing applicant appraisal procedure scores with a criterion which is legitimately based on the needs of the Federal Government."

Under S3-3a (37 Fed. Reg. 21558), acceptable evidence in criterion related studies like that in question consists of "statistical data demonstrating that the appraisal procedure, to a significant degree, measures performance or qualification requirements which are relevant to the job * * * for which candidates are being evaluated." And under S3-3b, "criterion measures may include work samples, objective measures of productivity, ratings, *tests*, or other appropriate methods" (emphasis added).

Moreover, when a successful applicant for employment participates in a training program, he obviously performs a job and to the extent that a test is a measure of his trainability, it is indeed "a reasonable measure of job performance." *Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 428 and 436. Or as Dr. Tenopyr points out in her affidavit (A. 175):

> "* * * Because it is not technically feasible to do a validity study for a group of employees at all points in time, e.g., every month from employment to retirement, in studying a given job the psychologist usually settles for a criterion measurement at one point in time. He then judges his validity at that point. Whether this criterion measurement is called job performance or training performance is often dependent upon whether a formal training program is involved. Very often criterion measures for jobs involving no classroom training, but considerable on-the-job training, are called job performance measures, but they could just as easily be called

> training performance. As long as the training is a bona fide job requirement, it is my opinion that it is irrelevant whether one speaks of training performance or job performance; *they are conceptually inseparable.*" (Emphasis added.)

Neither this Court nor Congress has ever suggested otherwise.

Yet, the failure of the Department to correlate its testing and training practices with "effective" performance of police duties after graduation from the police academy appears to be the Court's principal basis for invalidating Test 21 (CA. 13, 16-17). Similarly, the affidavits filed by respondents' psychologists attempt to focus the inquiry on the failure of Test 21 to predict post-training performance (A. 50, 54-55). One such affidavit, however, was quick to recognize (A. 50) that petitioners' "study indicates that test scores of both white and Negro candidates are positively correlated with grades in recruit school." But as the District Court observed (CA. 51), "so many factors affect a policeman's performance on the job it is doubtful that a written test could ever be devised that would prophesy performance accurately in advance."

These observations have cogent support in pronouncements made by experts in affidavits filed in behalf of the Commission. Thus, Dr. Maslow observes (A. 195) that:

> "• • • The policeman's behavior on the job depends not only in part on what he has learned in the training program, but also on many other factors in the situation, such as the nature of his assignment, the kind of supervision he has, and many unpredictable events in the community in which he is assigned. Thus, there is no feasible way, *before* entry into training, to measure accurately the probable behavior of a trained policeman in future situations which are difficult to anticipate at the time of selection for training. Furthermore, since applicants who do not meet recruit school standards will not become policemen, we believe it is completely reasonable to aim the selection test directly at applicants in terms of likelihood to succeed in recruit school." (Emphasis in original.)

And Dr. Owens notes (A. 207) that:

> "As a measure of ultimate job performance or proficiency, Test 21 appears to predict positively for whites, but near zero for blacks. The meaning of such a result should, however, be evaluated with caution since the criterion is the average rating of one judge on 9 traits, is of unknown reliability and is probably based upon little direct observation of typical job behavior. In short, the criterion of Recruit School Average is very likely substantially superior, as a criterion, to the criterion of job performance.
>
> "Both Dr. Ghiselli's work and commonly accepted practice argue that the test-wise prediction of trainability is a highly acceptable measurement objective. An ultimate criterion is often unknown, unobtainable, or so deficient in job relevance as to lack real utility. For example, professional aptitude tests for law, medicine, et al., are validated against success in training. Indeed, enlightened opinion would argue that, *within* a given profession, the highest scorers should not necessarily be expected to make the most money, obtain the greatest satisfactions, or become the most visible." (Emphasis in original.)

It is thus apparent that the Court's reasons numbered 3 and 4 impose such a heavy burden on the Department that it must prove its case to the hilt in order to retain its test. Cf. *Vulcan Soc. of N.Y. City Fire Dept., Inc.* v. *Civil Service Commission*, 490 F. 2d 387, 393 (2nd Cir., 1973). But the increased degree of verbal skill which modern policemen must possess and the attendant risks involved in appointing those who may lack such

skill render such a burden totally unjustified. Thus, in *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216, 219 (10th Cir., 1972), the Court, in holding that an employer had established the job relatedness of a college degree requirement for pilots by showing that the requirement related to success in the pilot training program, cited guidelines issued by the Equal Employment Opportunity Commission, stating (475 F. 2d at 219) that:

> "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. *On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. Cf. 28 C.F.R. § 1607.5(c)(2)(iii). The job of airline flight officer is clearly such a job.* * * *" (Emphasis added.)

The same may surely be said with respect to a policeman's job. Cf. *Terry* v. *Ohio*, *supra*, 392 U.S. at 9-15, 24. These pronouncements fully accord with this Court's observation in *Albemarle Paper Co.* that the job relatedness question is indeed a contextual one (45 L. Ed. 2d at 302). It follows rationally from such observation that the employer's related burden may be rendered less stringent, not only by the type of job involved but, as well, by the insubstantiality of any adverse racial impact found to exist (cf. Argument I, *supra*). See Note, *Developments in the Law—The Employment Discrimination and Title VII of the Civil Rights Act of 1964*, *supra*,

84 Harv. L. Rev. at 1118-1119, 1139. That being so, the conclusion of the Court of Appeals (CA. 17) that *Griggs* imposes a "heavy burden" in a case such as this is clearly erroneous.

The Court's holding that Test 21 cannot stand because no applicant with a test score below 40 enters recruit school is likewise inconsistent with established principles. The use of a cutoff score determinative of a passing grade is a familiar phenomenon in occupational and professional testing. Surely, a requirement that an applicant for appointment to a police department correctly answer only 40 out of 80 questions in an examination and thus demonstrate no higher degree of verbal ability than is represented by high school graduation (A. 35, 100-101), is a rationally based requirement. Indeed, D. L. Futransky points out in his paper that lowering the cutoff score from 40 to 35 would result in the admission to the Department of individuals whose verbal ability is below the high school graduation level (A. 100).[8] Such a watered down entrance standard would be manifestly inconsistent with the Department's right to recruit those persons whose verbal ability equates with that which a proper high school education is calculated to insure, a right which has more than ample support in the studies of the national and local commissions discussed at pages 20-21, *supra*. See also Report of the National Advisory Commission on Civil Disorders at 166. In addition, the use of the cutoff score of 40 for approximately 20 years during which the proportion of applicants passing the test

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[8] Dr. Owens notes in his affidavit (A. 206-207) that:

> "The Futransky paper could not answer the question of how people who scored below 40 would perform in the Recruit School. Although a statistical problem of 'restriction in range' exists, if the lowest scorers on Test 21 *were* present to obtain a Recruit School average, it is my opinion that they would tend to score at the bottom of the distribution and to obtain, hypothetically, failing grades." (Emphasis in original.)

"has remained fairly stable at about 60 percent" considered against the backdrop of the spiralling percentage increase in the black segment of the Department in recent years (A. 191-192) will further demonstrate the reasonableness of that cutoff score.

Instead of dealing with that precise issue, the Court of Appeals has ruled that before the Department can utilize such a cutoff score, it must demonstrate through authoritative study that a lower cutoff score will not legitimately serve its need to recruit persons who possess the verbal ability to be trained as policemen (CA. 13). But, in thus concluding that Test 21 must be stricken as an underinclusive employment practice, the Court has, in effect, engrafted a stringent compelling governmental interest review standard on occupational testing. Instead of supporting such an approach, this Court's decisions refute it.

First, since this case indisputably does not involve a claim of intentional discrimination (CA 8-9), the evaluation of the employment practice involved under the more stringent compelling governmental interest test is unjustified. See *Jefferson* v. *Hackney*, 406 U.S. 535, 548 (1972); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971). See also *Tyler* v. *Vickery*, 517 F. 2d 1089, 1101-1102, and n. 11 (5th Cir., 1975) (cutoff score of 70 in bar examination failed by disproportionate number of minority applicants for admission to practice law need not pass muster under compelling governmental interest test in the absence of purposeful discrimination).

Second, pronouncements made by this Court in *Albemarle Paper Co.* strongly suggest that the Court of Appeals, in invalidating Test 21 because of the Department's failure to demonstrate a workable cutoff score of less than 40 correct answers, misconceived the nature of the Department's burden. Thus, this Court observed (45 L. Ed. 2d at 301):

> "* * * If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' * * *"

It is thus apparent that this Court does not view the employer's burden as stringently as the Court of Appeals. Instead, this Court has made it plain that given the job relatedness of a test and, by parity of reasoning, the reasonableness of a cutoff score, the burden of demonstrating the feasibility of a less difficult test or less restrictive cutoff score shifts to the complaining party. Consequently, the Department was required to demonstrate only that the cutoff score of 40 was a rational one. Having made that demonstration, it was respondents' burden to demonstrate that a lower cutoff score would "serve the * * * [Department's] legitimate interest" in recruiting persons with the requisite verbal skills to be trained as policemen. Because respondents did not meet that burden in the District Court (CA. 51-52), the Court of Appeals was not justified in imposing it on the Department.

There remains the Court's holding that Test 21 is of doubtful value because nobody who passes it and enters the Department's training academy is failed, but is given the assistance needed to successfully complete training. But that factor obviously does not detract from the predictive significance of the test in establishing a line of demarcation reasonably calculated to separate persons possessing the ability to learn the duties of a policeman from persons lacking such ability. Indeed, the circumstance that the selected applicants successfully complete the training program demonstrates that Test 21 accomplishes its intended result.

In *Buckner* v. *Goodyear Tire and Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala., 1972), the plaintiffs attacked a job entrance examination as not being job related. The employer claimed that it met the legal job relationship requirements because it related to success in the employer's apprenticeship training program. In concluding that the showing of a relationship between the test and the training program was a legally acceptable method of establishing that the test was job related, the Court reacted quite differently than did the District of Columbia Circuit to facts disclosing that none of the selected individuals failed the training program. The Court said (339 F. Supp. at 1115, n. 7):

> "It is at least of some significance that since the tests were utilized no one selected for the program has failed in either the academic or practical phases of training, though a few have dropped out before completion."

The Fifth Circuit Court of Appeals affirmed, adopting the "carefully considered and well-written opinion" of the District Court. See *Buckner* v. *Goodyear Tire and Rubber Co.*, 476 F. 2d 1287 (1973). It is submitted that the quoted pronouncements made in that case represent a rational and equitable approach and should be followed by this Court.

In sum, Test 21, much like the high school education requirement, the validity of which respondents do not and cannot logically challenge, is a reasonable measure of a police recruit's ability to learn to perform the professional services of modern law enforcement and, in so doing, rise to a challenge of continuing complexity in an evolving society. Nonetheless, the utilization of the test by petitioners has precluded neither a steady spiralling percentage increase of racial minorities in the Metropolitan Police Department (A. 191-192), nor what has developed to be proportional minority representation

in recruitment (CA. 49; A. 71-72). Test 21 has none of the arbitrary features with which this Court was concerned in its other employment testing cases and the reasons of the Court of Appeals for invalidating that test, whether considered individually or in their totality, are at variance with both reason and authority. They should not be countenanced by this Court.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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